82-1249
No.

Supreme Court, U.S.
FILED
JAN 21 1983
Alexander L. Stevas, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOSE OJEDA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RICHARD L. HUFFMAN
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Questions Presented for Review

1. Does a jury instruction that the presence of a firearm in a car is presumptive evidence that the car's occupant knowingly possessed the firearm violate the Fourteenth Amendment's Due Process Clause when there is no other evidence connecting the occupant and the firearm?

2. Does the Fourth Amendment prohibit state law enforcement authorities from searching a car when it has been stopped for a routine traffic infraction and there is no other ground upon which to find reasonable cause for the search?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOSE OJEDA,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Opinions Below

The New York State Court of Appeals denied leave to appeal. The Appellate Division of the Supreme Court of the State of New York in and for the First Department affirmed the judgment convicting the defendant without opinion. The opinion of Justice P. McQuillan denying petitioner's pre-trial motion to suppress is not reported and appears in Appendix D hereto.

Jurisdiction

The petitioner, Jose Ojeda, respectfully prays that a writ of certiorari issue to review the judgment of conviction entered against him on October 19, 1981, which

was affirmed without opinion by the Appellate Division of the Supreme Court and denied further review by the New York State Court of Appeals.

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Penal Law § 265.15(3)

The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub

or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

Statement of the Case

The Facts

On September 5, 1980, shortly after 5:00 a.m. in Manhattan, as New York City Police Officers Dugan and Ohrnberger were on radio patrol, they passed a car with a Wisconsin license plate double parked on the opposite side of the street. Two people were in the front seat. Proceeding for another block, the officers made a "U-turn" and then observed the Wisconsin-licensed car, now with only one person in it, pull away and turn left without making a left-hand turn signal. Following the car for one half-block, the officers drove up to the car, which had parked, and observed the now sole occupant, the petitioner Jose Ojeda, alight. Approaching on foot, Officer Dugan demanded petitioner's license and registration. Petitioner gave his name, produced a bank credit card and told Officer Dugan that he was parking the car for his friend, whom he also named. While Officers Dugan and Ohrnberger watched, petitioner then retrieved from the glove compartment a rental agreement which bore the names of two authorized drivers, neither of which was the named friend for whom petitioner was parking the car.

Officer Ohrnberger then returned to the police cruiser and, using a special radio, sent the license number of the car to a New York State computer which listed stolen cars. He received a response that the car was not stolen. At trial Officer Ohrnberger contradicted Officer Dugan and testified that petitioner, after obtaining the registration papers, momentarily rested his elbows on his knees with his hands out of sight between his knees while sitting on the driver's side of the car. Officer Ohrnberger ordered petitioner to get out of the car and began searching its interior. Both officers agree Officer Ohrnberger found a revolver hidden under the front seat on the passenger side. Petitioner was then arrested and subsequently indicted for criminal possession of a weapon in the third degree in violation of New York Penal Law § 265.02.

The Pre-Trial Suppression Hearing

Petitioner raised the claim that his Fourth Amendment rights were violated prior to the trial by motion to suppress use of the firearm as evidence. On May 8, 1981, New York State Supreme Court Justice P. McQuillan denied petitioner's motion to suppress the weapon, finding that the police had probable cause to believe both that the vehicle had been stolen and that a search of the vehicle might produce evidence of the theft.[1] The case then proceeded to trial.

The Trial Judge's Charge

Petitioner raised the claim that his Fourteenth Amendment rights were violated by the trial judge's charge by objection prior to the giving of the offending charge to the jury and by exception thereafter.[2] The trial judge in-

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[1] A copy of Justice McQuillan's opinion is set forth in Appendix D hereto.

[2] Copies of the relevant portions of the trial transcript containing the relevant objections are set forth in Appendix E hereto.

structed the jury that any person occupying a car at the time a firearm is found therein may be presumed to have knowing possession of the firearm.[3] Three hours after the jury commenced deliberations, it returned with a question regarding the law on presumption as follows:

> The Court: Madam Forelady, we have your question at 2:10. It says, "could you review with the jury the section of the law that you interpreted about inference —we believe that you said that if a person is in a car which is not a public omnibus or a stolen car and the gun is present, we may conclude that the person had possession of the gun." (Trial Transcript p. 174)

In response to this request the trial judge twice repeated his presumption charge. Shortly thereafter petitioner was found guilty of criminal possession of a weapon in the third degree. On October 19, 1981, petitioner was sentenced to forty-five days' imprisonment to be served on weekends plus five years' probation. He has been released on bail pending determination of this petition.

State Court Appeals

Petitioner appealed as of right to the New York State intermediate appellate court, the Appellate Division of the Supreme Court of the State of New York, in and for the First Department on November 13, 1981. The judgment of conviction was affirmed on September 16, 1982 without opinion. Application was then made for leave to appeal to the New York Court of Appeals on October 7, 1982.[4] Permission for leave to appeal was denied on November 23, 1982.[5]

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[3] A copy of the trial judge's charge is set forth in Appendix E hereto.

[4] A copy of the letter requesting leave to appeal is set forth in Appendix B hereto.

[5] Copies of the orders of the appellate courts are set forth in the Appendices A and C hereto.

REASONS FOR GRANTING THE WRIT

1. The use of the presumption that the presence of a firearm in a car is prima facie evidence of knowing possession of the firearm by all those occupying the car at the time the firearm is found violated petitioner's Due Process rights under the Fourteenth Amendment to the United States Constitution because there was no rational connection between his occupancy of the car and the presumed fact of petitioner's knowing possession of the firearm hidden in the car.

The judgment of conviction entered against the petitioner in this case should be summarily reversed on the opinion of this Court in *County Court of Ulster Cty.* v. *Allen,* 442 U.S. 140 (1979) because the trial court improperly charged the jury as to presuming a material element of a crime. Consequently, petitioner believes the state courts have decided a federal question in a way which is in conflict with the applicable decision of this Court and certiorari should be granted.

Ulster County and its progenitors require that there be a rational connection between the basic facts which the prosecution proved and the ultimate fact which the jury is asked to presume, *i.e.,* that the petitioner knowingly possessed the hidden firearm. While the use of most[6] of the language in the permissive presumptive charge given by the trial judge was approved by the majority of this Court in *Ulster County,* Justice Stevens carefully reiterated the rational connection standard originally articulated in *Tot* v. *United States,* 319 U.S. 463,

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[6] The trial court charged the jury that they may presume *knowing* possession by the petitioner. This exceeds the presumption authorized to be given by New York State statute. The statute, New York Penal Law § 265.15(3), does not authorize use of the word "knowing" nor the charging of the element of knowledge. This issue was not addressed by the Court in *Ulster County.*

467 (1943), and required that the ultimate fact which the jury is asked to presume must be "more likely than not to flow from" the basic facts proven. 442 U.S. at 166 (quoting from *Leary* v. *United States*, 395 U.S. 6, 39 (1969)). In the case at bar there were no basic facts proven from which one could rationally conclude that petitioner knew of the gun, much less that he exercised dominion and control over it. Unlike the facts before this Court in *Ulster County*, the gun here was not in plain view; there were not several large guns, but rather one small hand gun, and absolutely nothing in the behavior of petitioner suggested that he had knowledge of the gun. All that was proven here was that petitioner occupied the car, that he was not authorized to drive the car pursuant to the terms of the rental agreement, and that petitioner placed his hands between his knees for a moment.[7]

These facts are insufficient to establish the requisite rational nexus between petitioner and the gun. This is especially true when these facts are viewed in the context of the rest of the evidence. At the time of the search, petitioner had been alone in the car for only a few seconds, the car was *not* known to be stolen, petitioner was sitting on the driver's side and could not have touched the gun under the seat on the passenger's side and, even as Officer Ohrnberger admitted, petitioner never had a gun in his hands or anywhere on his person.

On the basis of the totality of this evidence, it is just as likely that petitioner's friend or the lessor of the car, neither of whom the police arrested or even tried to contact, was the knowing possessor of the gun. There is certainly no rational connection between petitioner and the gun, and therefore no reason to utilize a presumption.

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[7] In order to have found this as a fact, the jury would have had to have credited Officer Ohrnberger's testimony over that of Officer Dugan.

The operation of the presumption places petitioner in an unfair legal predicament; although he was presumed to have knowing possession of the weapon found in the search, he apparently would have no standing under *Rakas* v. *Illinois*, 439 U.S. 128 (1978), to contest the legality of the search because he has no ownership interest in the car, having been the driver for only twenty seconds, and because he has no ownership or possessory interest in the gun. The practical effect of this legal predicament is to obviate the need for a jury and require conviction by operation of law.[8] This Court should clearly establish that where a defendant may be presumed by operation of law to have possession of an incriminating object, he must also have legal standing to contest the manner in which law enforcement authorities discovered the object.

Petitioner asks this Court to grant certiorari and reverse the judgment of conviction entered against him.

2. The Court's decision upholding the search of the car cannot be justified as a car search under United States v. Ross, and there is a conflict between circuits as to whether it can be upheld as a protective stop and frisk under Terry v. Ohio and its progeny.

Although there is substantially less protection for automobiles and their contents under the Fourth Amendment, *see, Carroll* v. *United States*, 267 U.S. 132 (1925); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *United States* v. *Ross*, —— U.S. ——, 102 S.Ct. 2157 (1982), probable cause

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[8] The lower courts never considered this aspect of the presumption. The prosecutor at the hearing on the motion to suppress the search did not raise the standing issue and Justice McQuillan apparently assumed standing. On appeal to the Appellate Division the prosecutor argued that petitioner lacked standing, but the Appellate Division did not decide the question. It is not clear whether Judge Fuchsberg of the New York Court of Appeals assumed standing when denying petitioner leave to appeal.

still must exist to conduct a search. A determination must be made based on objective facts that could justify the issuance of a warrant, and not merely the good faith of the officers. *United States* v. *Ross*, —— U.S. at ——, 102 S.Ct. at 2164. The facts of this case do not support the finding of probable cause to search petitioner's car which was made by Justice McQuillan in denying petitioner's pretrial motion to suppress.

Petitioner was stopped by Officers Dugan and Ohrnberger after committing a traffic infraction by turning left without signalling. Upon being stopped, petitioner alighted from the car and produced a bank credit card for identification, as well as a rental agreement that did not contain his name or the name of his friend for whom petitioner was parking the car. Officer Ohrnberger radioed the car's license number into the Police Department, and was informed that the car was not reported stolen. At this point, the officer did not arrest petitioner, nor cite him for any violation. Instead, Officer Ohrnberger demanded the keys and began searching the inside of the car. Only when a gun was found, was petitioner arrested.

In order to stop a car to search it, a police officer must have probable cause to believe that the vehicle contains contraband or other evidence of a particular crime, or that it is involved in the commission of a crime. *Carroll* v. *United States*, 267 U.S. 132 (1925); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). In the case at bar, there was no reason to believe that the car petitioner was driving contained any contraband, or that it was involved in a crime.[9] *Accord, United States* v. *Ross*, —— U.S. ——, 102 S.Ct. 2157 (1982). Despite the fact that the officers at the time of the search had been advised by the Police Depart-

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[9] Petitioner did not commit a "crime" by turning without signalling. He violated N.Y. Vehicle and Traffic Law (VTL) § 1163, which is defined as a "Traffic Infraction" in VTL § 1101. Although a police officer in New York is empowered to arrest when he has reasonable cause to believe any offense has been committed

(*footnote continued on following page*)

ment that the car had not been reported stolen, Justice McQuillan, without explanation, found that they had probable cause to believe that the car was stolen.

If no probable cause existed to search the car, as in this case, the only other way that the pre-arrest search by the police can be justified is if it was an investigatory "stop and frisk" under *Terry* v. *Ohio*, 392 U.S. 1 (1968). A frisk of the petitioner would have been justified if the officers "had reason to believe that [they were] dealing with an armed, dangerous individual." 392 U.S. at 27. However, the officers did *not* proceed to frisk petitioner, but rather, assuming the truth and accuracy of Officer Ohrnberger's testimony, he observed the petitioner place his hands between his knees, then ordered petitioner out of the car and proceeded to "frisk" the car, not the petitioner.

Circuit Courts of Appeals are divided on whether a *Terry* frisk can include the inside of a car that the subject was driving and to which he is likely to return. *United States* v. *Rainone*, 586 F.2d 1132 (7th Cir. 1978), *cert. denied* 440 U.S. 980 (1979) held that such a frisk of a car was constitutional. In *Rainone*, the defendants were ordered out of the car after being stopped under what the court termed "obviously suspicious circumstances". Both defendants were given pat-down searches and nothing was found. The police then looked inside the car and felt under the seat, finding dynamite. The Court found that it was a

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(*footnote continued from preceding page*)

in his presence (N.Y. Criminal Procedure Law § 140.10), and for the purpose of warrantless arrest, a traffic infraction is an offense (VTL § 155; N.Y. Penal Law § 55.10), New York courts have interpreted the law as not intended to authorize a *search* of a person for a traffic offense unless there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than a mere traffic offense. *People* v. *Marsh*, 20 N.Y.2d 98 (1967). Although *United States* v. *Robinson*, 414 U.S. 218 (1973) upheld the full search of a person arrested for a traffic offense, it did not discuss searching the vehicle.

valid *Terry* stop and frisk and that the scope of the stop and frisk included the inside of the car because of the risk that the suspect could return to the car and obtain weapons. Other circuits have applied a similar rule. In *United States* v. *Green*, 465 F.2d 620 (D.C. Cir. 1972), the car was stopped for running a stop sign and the officer saw the defendant make "furtive gestures" indicating he was armed. After ordering the defendant out of the car, the officer looked under the car seat and found a gun. The frisk of the car was upheld under *Terry* as being a self-protection measure. *See also, United States* v. *Wilkerson*, 598 F.2d 621 (D.C. Cir. 1978). However, the Fifth Circuit, in *Government of Canal Zone* v. *Bender*, 573 F.2d 1329 (5th Cir. 1978), refused to extend the *Terry* frisk to the inside of a car. Like the case at bar, in *Bender*, the defendants were ordered out of the car and one of the officers stood between the car and the defendants. The other officer found contraband in the car. The Fifth Circuit refused to uphold the frisk, noting that, as in petitioner's circumstances, neither defendant had been frisked before the car was, thereby completely defeating the protective rationale of *Terry*. The court wrote: "To allow the scope of a *Terry* search to extend outside the area of immediate control would be to sever the *Terry* exception from its rationale". 573 F.2d at 1332. *See also, United States* v. *White*, 648 F.2d 29, 43 at n. 48 (D.C. Cir.), *cert. denied* 454 U.S. 924 (1981) ("The right to stop does not include any right to frisk unless there is a particularized reason to believe the occupants are carrying weapons. It also does not include the right to search the car other than to look inside for objects 'in plain view'.")

While there was clearly not sufficient cause to search the car when parked after the petitioner committed a traffic infraction, there was enough to justify a *Terry* stop, and to order the petitioner out of the car under

Pennsylvania v. *Mimms*, 434 U.S. 106 (1977). Although this Court has never extended the *Terry* frisk to include a car, the Circuit Courts are in conflict as to this issue, an issue of significant constitutional importance which warrants this Court's consideration.

Therefore, in order to resolve the present conflict between the Circuits presented by this case, the Court should grant certiorari.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the order denying leave to appeal to the New York State Court of Appeals.

Dated: New York, New York
January 21, 1983

Respectfully submitted,

RICHARD L. HUFFMAN
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Appendix A—Certificate Denying Leave to Appeal to the New York Court of Appeals, Dated November 23, 1982

STATE OF NEW YORK COURT OF APPEALS
CERTIFICATE DENYING LEAVE

Before: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSE OJEDA,

Defendant-Appellant.

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
November 23, 1982

/s/ JACOB D. FUCHSBERG
Associate Judge

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* Description of Order: Order of the Appellate Division, First Department dated September 16, 1982, affirming judgment of Supreme Court, New York County, rendered October 18, 1981.

Appendix B—Letter of Richard L. Huffman, Esq., Seeking Leave to Appeal to the New York State Court of Appeals, Dated October 7, 1982.

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October 7, 1982

Honorable Lawrence H. Cooke
Chief Judge
Court of Appeals—State of New York
Albany, New York 12207

Attn. Joseph W. Bellacosa
Clerk of the Court

Re: People v. Ojeda, Index No. 710/81
New York County

Dear Justice Cooke:

This is an application made pursuant to Criminal Procedure Law Section 460.20 on behalf of the defendant Jose Ojeda for a certificate granting leave to appeal to the Court of Appeals from an order of the Appellate Division, First Department dated September 16, 1982 affirming a judgment of conviction without opinion. No application for such leave has been made to a Justice of the Appellate Division. Oral argument on this application is requested if it can be accomplished by conference call or in New York County.

Appendix B

Very briefly, the facts which give rise to this appeal are the following: As the defendant was parking a friend's rented car he was stopped by police officers for failure to use the left hand turn signal. A passenger had exited the car a minute or two before the left hand turn. The defendant was arrested, the car was searched by the police and a gun was found under the passenger seat.

A complaint was filed charging defendant with commission of a felony. On motion of the People and after finding there was no reasonable cause to believe a felony had been committed Judge Gartenstein reduced the charge to a misdemeanor. A few days later the People obtained a felony indictment again charging the defendant with criminal possession of a weapon in the third degree. Penal Law § 265.02(4). By pretrial motion the defendant sought to suppress the gun, but his motion was denied by Justice McQuillan in a written opinion. At trial, Judge Hornblass instructed the jury that defendant may be presumed to have intentionally and knowingly possessed the gun. After asking for that charge to be re-read, the jury convicted the defendant. During trial defendant called two witnesses, a high school principal and the vice president of a computer software firm who testified as to his good character. At sentencing defendant submitted letters from his employer, State Assemblyman and a State Senator. Nevertheless, on October 18, 1981 Judgment was entered and defendant was sentenced to a term of imprisonment of forty-five days to be served on weekends. Defendant is released on bail pending determination of his appeal.

The legal issues preserved for appeal are:

1. Was the complete search of the car after appellant was stopped for a traffic violation "reasonable" within the meaning of the Fourth Amendment?

2. Did the Court correctly charge the jury that the defendant could be presumed to intentionally and knowingly possess the gun simply because he was an occupant of the car?

3. Can a defendant constitutionally first be denied "standing" to challenge a search because he lacks a possessory interest in the object searched for, but then be convicted on the basis of a presumption that he knowingly and intentionally possessed the object searched for?

4. Was there sufficient evidence to find the appellant guilty beyond a reasonable doubt of intentionally and knowingly possessing the gun hidden under the passenger seat of the borrowed, rented car?

5. Can the appellant be indicted on a felony gun charge after the felony gun charge in the criminal complaint was reduced to a misdemeanor by a judge upon motion of the prosecutor after a finding there was no reasonable cause to believe that a felony had been committed?

6. Can the prosecutor break his agreement to accept a plea to a Class B misdemeanor and obtain a felony indictment on a result of political pressure from the Mayor?

7. Should the conviction of appellant be reversed in the interest of justice?

Enclosed herewith are the following:

a) Opinion of Justice Peter McQuillan denying appellant's motion to suppress the gun;

b) Appellant's brief submitted to the Appellate Division;

c) Respondent's brief submitted to the Appellate Division; and

d) Order of affirmance of the Appellate Division.

If there is any other information or documents which you may require, please let me know and I will try to supply them.

Very truly yours,

RICHARD L. HUFFMAN
Richard L. Huffman

RLH/dh-a
Enclosures a/s

cc: Hon. Robert Morganthau
District Attorney
New York County

Appendix C—Order of Affirmance On Appeal From Judgment by the Appellate Division, First Department, of the New York Supreme Court, Dated September 16, 1982

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 16, 1982.

Present—Hon. Leonard H. Sandler, Justice Presiding
Max Bloom
Arnold L. Fein
Sidney H. Asch
E. Leo Milonas, Justices.

Order of Affirmance on Appeal from Judgment 14309.

The People of the State of New York,

Respondent,

against

Jose Ojeda,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Hornblass, J., at trial and sentence; McQuillan, J., at suppression hearing) rendered on October 18, 1981, convicting defendant of criminal possession of a weapon in the third degree, and said appeal having been argued by Mr. Richard L. Huffman of counsel for the appellant, and by Mr. Charles E. Knapp of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjuged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Enter:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Appendix D—Opinion, Decision and Order of Justice McQuillan, Supreme Court of the State of New York, Dated May 8, 1981

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 69

Indictment No. 0710/81

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSE OJEDA,

Defendant.

McQUILLAN, J.:

Defendant has been indicted for the crime of criminal possession of a weapon in the third degree as an armed felony. Defendant, claiming to be aggrieved by an unlawful search and seizure, has made a motion for an order suppressing physical evidence (a weapon and the ammunition in that weapon) seized on September 5, 1980. A pre-trial suppression hearing was conducted before me on April 13, 1981. One witness testified at this hearing: Police Officer James Dugan. I gave credence to his testimony.

Although defendant has the ultimate persuasion burden of proving the illegal seizure of physical evidence, the People, nonetheless, have the burden of going forward to show, in the first instance, the legality of the police conduct that resulted in the seizure of the evidence sought to be suppressed.

Appendix D

Findings of Fact

Police Officers James Dugan and William Orenberger were on radio patrol duty in the early morning hours of September 5, 1980. At approximately 5:00 A.M., while driving southbound in their patrol car on St. Nicholas Avenue, they noticed a vehicle with a Wisconsin license plate. The vehicle was at the time double-parked, facing northbound, on St. Nicholas Avenue between 145 and 146 Streets. Officer Dugan noticed two figures seated in the front seat of the vehicle.

The officers proceeded southbound on St. Nicholas Avenue past the vehicle with a Wisconsin license plate, and made a U turn just prior to the intersection of St. Nicholas Avenue and 145 Street. As they completed the U turn they saw the double-parked vehicle pull away from the curb and proceed to the intersection of St. Nicholas Avenue and 147 Street, where the driver of the vehicle (defendant) made a left turn onto 147 Street without signalling. At this point Officer Dugan noticed that there was only one person (defendant) in the vehicle.

The defendant drove this vehicle approximately half a block west on 147 Street and parked it in front of a fire hydrant. The officers double-parked their vehicle behind the defendant's. The defendant had already exited the vehicle with a Wisconsin plate when the officers exited their patrol car. Officer Dugan proceeded to the driver's side of the vehicle which defendant had been driving and requested a license and registration for the vehicle. Officer Orenberger was by this time positioned on the passenger side of the vehicle, standing on the sidewalk.

The defendant informed Dugan that he did not have a driver's license. Defendant did produce a Citibank card to identify himself to the officers. He informed Dugan that a named friend, who owned the vehicle, had asked him

(defendant) to park it. Defendant first stated that he did not know where the vehicle's registration was, and then produced a rental agreement from the automobile's glove compartment. This rental agreement was between National Car Rental Systems and Carl Carter. Carl Carter was not the name of the friend defendant had only seconds earlier stated to be the vehicle's owner. There was an additional name on the rental agreement, William Scott, also not the name of the friend defendant had given the officers. The license number of the vehicle matched the license number on the rental agreement.

Dugan radioed police headquarters for a stolen car check on the vehicle. This check produced no confirmation that the vehicle had been stolen. At this point Officer Orenberger took the vehicle's keys from the defendant and proceeded to open the passenger side door. Dugan remained with the defendant, outside the vehicle, on the driver's side. Orenberger began to search the vehicle and almost immediately discovered a Luger revolver under the front passenger seat. When Dugan was informed by Orenberger of the discovery of the weapon he frisked the defendant, handcuffed him, and radioed for a backup patrol car. One of the backup officers drove the National Car Rental vehicle to the station house. Dugan and Orenberger returned to the station house with the defendant.

At approximately 7:45 A.M. Dugan spoke with an official of National Car Rental, who stated that defendant was not authorized to drive the rented vehicle. Later the same day, Dugan spoke to another official of National Car Rental. This second official informed Dugan that the vehicle defendant had been driving was a stolen vehicle. Dugan vouchered the vehicle, a standard police procedure which involves an inventory search of the interior of the car.

Appendix D

CONCLUSIONS OF LAW

In deciding whether or not a particular search or seizure is reasonable, I "must consider . . . whether or not the police action was justified in its inception and . . . whether or not that action was reasonably related in scope to the circumstances which rendered its initiation permissible." People v. DeBour, 20 NY2d 210, 215 (1976), *quoting* People v. Cantor, 36 NY2d 106, 111 (1975). I find, under the circumstances here, that the police action was reasonable both in its inception and scope.

The police may stop a motor vehicle on a public street when, *inter alia*, there is a reasonable suspicion that its occupants have been engaged in conduct in violation of law. People v. Sabotker, 43 NY2d 559 (1978). Here the officers had observed the defendant make a left hand turn without signalling, in violation of the Vehicle and Traffic Law. They were therefore justified in approaching defendant and requesting from him a copy of his driver's license and registration. *See, e.g.*, People v. Singleton, 41 NY2d 402 (1977).

Once the defendant failed to produce a driver's license or registration, and instead produced a rental agreement in the name of an individual which differed from that of the person he had only seconds earlier stated to be the vehicle's owner, it was not unreasonable for Officer Orenberger to ask the defendant for the keys to the vehicle. Nor was it unreasonable for the officer to search the vehicle.

At the time of the search the officers had probable cause to believe both that the vehicle had been stolen and that a search of the vehicle might produce evidence of its theft.

Assuming that the officers did not have probable cause to believe that the vehicle had been stolen, it was still

reasonable for the officers to have searched the vehicle in an effort to determine ownership. The defendant, given an opportunity to produce proof of registration, had not done so. Instead, he produced a rental agreement in the names of two unknown and unidentified individuals. Defendant's only explanation of ownership right was a statement that he had been asked to park the car for a named but possibly fictitious friend. The officers were not required to accept this explanation, because defendant's statements cast serious doubt on his veracity. The officers could, under these circumstances, reasonably look for registration papers in the car's interior. The fact that Officer Orenberger discovered a gun and not registration papers does not make the search unconstitutional under Fourth Amendment principles.

Even were I to conclude, which I do not, that Officer Orenberger acted unreasonably in searching the vehicle, the evidence seized would be admissible under the "eventual discovery" or "inevitable discovery" doctrine. This doctrine allows the People to prevent suppression by proving that the evidence would have been discovered through legitimate means in the absence of official misconduct. Put somewhat differently, the doctrine allows the People to remove the "taint" from the "fruits" by establishing that the improper official conduct was not a *sine qua non* of the discovery of the evidence. *People* v. *Fitzpatrick*, 32 NY2d 499, *cert den*, 414 U.S. 1033 (1973).

Here Officer Dugan would certainly have retained possession of the vehicle and conducted an inventory of its interior until he could ascertain proper ownership. To have done otherwise would have constituted dereliction of duty and violation of standard police procedure.

While it is usually difficult to hypothesize what the police response will eventually be to a given situation, because "it is extremely rare to find a normal, lawful

police procedure which is regularly followed and inevitably would have produced the same exact information" or result, Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized," 56 Cal. L. Rev. 579, 629 (1968), the inventory procedure of an impounded vehicle is a routine police procedure with predictable results. I can be practically certain that this procedure would have resulted in a lawful seizure of the weapon and ammunition.

Defendant's motion to suppress the weapon and ammunition is therefore denied in all respects.

The aforesaid constitutes the opinion, decision and order of the court.

Dated: May 8, 1981

/s/

PETER J. MCQUILLAN
Justice, N. Y.

Appendix E—Excerpts From Transcript of Trial Before Hon. Jerome Hornblass, Justice of the Supreme Court of the State of New York, Dated August 5-6, 1981

Trial Transcript at p. 101

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Mr. Huffman: Judge, I think it might help if I spoke about it momentarily.

I did a little bit of research last evening and I can give your Honor the cases that I found and the analysis that I found. Obviously, the leading case on the subject is County Court of Ulster County versus Allen, which is the Supreme Court case of two years ago which is 99 Supreme Court 2213.

The Ulster County case, while it upheld the giving of this charge, upheld it in a very narrow way. The opinion—the decision was a five to four decision. There wasn't even a majority opinion. There were four justices who concurred in one opinion and there was a separate concurrence, and in the opinion written by the—concurred in by four of the justices, it was a very narrow opinion and it said in essence that only if the facts of the case warranted it could this charge be given. That is, only if there was some sort of rational or reasonable basis for giving the charge should it be given, and if it was given it had to be [102] given in the context of an extremely strong discussion of mandatory presumption of innocence in favor of the defendant. That's found at Page 227 of the Supreme Court's opinion.

I think closer to the facts of this case, though, are two cases that were before judges of the Supreme Court of the State of New York in New York County. One of them is People versus Joseph, which is at 422 New York Sup. Second 751, and the other of which is People versus Alston,

which is 404 New York Sup. Second 277. Both of those cases were decided in 1978. The opinion on one of them was written—on Joseph was written by Administrative Judge Leo Milonis. The decisions in both cases were after the Second Circuit decision which found this presumption unconstitutional but prior to the Supreme Court decision upholding the presumption.

I think the thrust of both judges' reasoning in both the Alston and Joseph case was where you only have an occupant of a car in the car and the gun in the car, that is not sufficient to give this charge, that it's not rational and there's no reasonable way that a reasonable person could come to the conclusion that the occupant of the car had knowing possession of that gun. [103] There has to be something more than just that bare bones fact pattern. Either the occupant of the car has to reach for the gun, the occupant of the car has to be seen to put something into the car, the occupant of the car has to perhaps have a purse and the gun be sticking out of the purse of maybe just with a woman. Some sort of fact pattern like that.

Perhaps the gun is in the jacket of the occupant of the car. There is something else other than the mere presence that is required before this presumption can be given. I think that it would be improper to give any kind of charge with respect to presumption to this jury.

The Court: You want to withdraw this request?

Mr. Huffman: My first point is that no charge should be given to the jury on presumption whatsoever. If your Honor for some reason finds against the defendant on that point, then I think that this charge should be given to the jury without the word "knowing" in it, because, as I read the statute on presumption, the statute says that you can presume possession. It does not say anything about you may presume knowledge. In the absence of the word "knowledge" in the presumption, I don't think that it can be charged to the jury.

[104] The Court: The whole idea of presumption is to speak of knowing.

Mr. Huffman: It also has to do with possession. There is a distinction betwen the two. Nothing in the presumption says anything about knowing. It just says possession. If you are giving them the charge, it should be limited to the statutory language. It doesn't say anything about knowing.

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Trial Transcript at p. 108

• • • •

The Court: Yesterday before we left, Mr. Huffman, you made two requests. Do you still make those same requests?

Mr. Huffman: Yes. One is that there would be no charge at all with respect to presumption and second is that if your Honor rules against me with respect to that, then the charge without the word "knowing" added should be given.

The Court: Just so we could understand your thinking, tell me why you do not want the presumption charge.

Mr. Huffman: It's the Defendant's position that the People have failed to produce evidence which would be sufficient to enable a reasonable person to logically conclude that the defendant had knowing [109] possession of the gun.

And in the absence of any evidence that would tend to show that, it's improper for the jury to be instructed that they can presume that he knew it.

• • • •

The Court's Charge to the Jury at p. 158
Trial Transcript

According to the law, to possess means to have physical possession or otherwise exercise dominion or control over tangible property. Possession of property must be knowing possession, that is, the alleged possessor must be aware of his possession of the property.

Now, it has been referred by the lawyers, that there is a presumption. Now, there is a special presumption enacted again by our Legislature having to do with situations where this kind of an object is found in an automobile, and it's also a section of the law, and that section of the law is called 265.15 Subdivision 3, and the headline of that section is special presumption having to deal with criminal possession of a weapon. Now pay close attention.

The fact of knowing possession—well, you know what I will do? I want you to keep that in the back of your mind and I will get to presumption. I want to go to the other elements of the crime first then I will get to that.

We have spoken about Element No. 1, that there has to be a tangible—a certain object.

Number two, the second element, that the defendant possessed the—what the defendant possessed—this [159] object was in fact a firearm.

According to the law, a firearm is any pistol, revolver, sawed-off shotgun or other firearm of the size which may be concealed upon the person, except an antique firearm.

3. That the firearm was loaded at the time the defendant possessed it.

According to the law a loaded firearm is any firearm loaded with ammunition.

That's the third element.

The fourth element is that the defendant knowingly possessed the loaded firearm. According to the law, a person knowingly possesses a loaded firearm when he is aware that he possesses that loaded firearm.

And five is that the defendant's possession of the loaded firearm did not take place in his home or his place of business.

Now I want to get back to the presumption. You remember when I spoke about the elements I said that the first element is that you have to find that on September 5, 1980, in New York, the defendant possessed a certain object.

That object is a firearm, and that firearm is a loaded firearm, and that loaded firearm [160] has to be knowingly possessed and that firearm cannot be in a place of business or in a home. And I said that there's a special presumption enacted by the Legislature, and here it is. I'm not going to read the section, I will explain it to you now. So I am not quoting the section, but I am explaining to you what the section is.

The fact of knowing possession of a loaded firearm on the part of any person occupying an automobile at the time that such firearm is found therein is often the secret operation of such person's mind. Therefore, the law permits—and I emphasize, the law permits, but does not require, the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a loaded firearm in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the firearm by any persons occupying such automobile at the time such firearm was found.

This means that after considering all of the evidence in the case, you may presume or infer from the presence of the firearm in the automobile—by the way, if you find that it is a firearm, again, if you find, and I've been over that again, that the [161] firearm was possessed by any persons occupying such automobile at the time such firearm was found, or you may reject such presumption. However, the fact that you may infer such possession does not shift to the defendant any burden of proof whatsoever. The burden of proof remains on the prosecution throughout the case. Before you may return a verdict of guilty, each of you, after careful consideration of all of the evidence in the case, must be satisfied that the prosecution has proved beyond a reasonable doubt each and every element of the crime of possession of a weapon.

• • • •

Appendix E

At Conclusion of Court's Charge, p. 165 Trial Transcript

Mr. Huffman: I just want to preserve the exceptions and motions I made earlier.

• • • •

Court's Response to Jury's Question Regarding Inference, p. 174 Trial Transcript

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The Court: Madam Forelady, we have your question at 2:10. It says, "could you review with the jury the section of the law that you interpreted about inference—we believe that you said that if a person is in a car which is not a public omnibus or a stolen car and the gun is present, we may conclude that the person had possession of the gun."

[175] First I appreciate the fact that you have very good handwriting. Your grammar—

The Foreperson: Two people wrote that.

The Court: I'm going to say a couple of things to you.

First, as jurors you have it within your power to draw proper, reasonable and just inferences from the testimony and the exhibits in evidence and to determine the probabilities arising from the case after carefully analyzing, weighing and considering the testimony of each witness who has testified at this trial and all exhibits in the case.

The defendant is entitled—I am repeating what I said to you before, it is nothing new. I said it before and I will repeat it, because I think it answers your question.

The defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence, and where two inferences may be drawn from the evidence, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference of innocence.

Now, I told you too that in addition to the—not in addition but there are five elements attached [176] to this crime of Criminal Possession of a Weapon in the third degree, and I also said that there is a special presumption which can be—which may be applied to this situation. I'm going to repeat what I said to you.

The fact of knowing possession of a weapon on the part of all persons or any persons occupying an automobile at the time when this weapon was found is often the secret operation of such person's mind. Therefore, the law permits but does not require the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a revolver in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the revolver by any person occupying such automobile at the time such revolver was found. This means that after consideration of all of the evidence in the case, you may presume or infer from the presence of the revolver in the automobile that the revolver was possessed by any person occupying such automobile at the time such revolver was found. Or you may reject such presumption.

However, the fact that you may infer such [177] possession does not shift to the defendant any burden of proof whatsoever. The burden of proof remains with the prosecution throughout the case. Before you may return a verdict of guilty, each of you, after careful consideration of all the evidence in the case, must be satisfied that the prosecution has proved beyond a reasonable doubt each and every element of the crime of possession of a weapon.

I'm going to repeat again the first two paragraphs regarding the presumption.

The fact of knowing possession of a weapon on the part of all persons occupying an automobile at the time such weapon is found therein is often the secret operation of

such person's mind. Therefore, the law permits but does not require the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a revolver in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the revolver by all persons occupying such automobile at the time such revolver was found.

• • • •

[179]

(At 3:05 p.m. the jury retired to continue their deliberations.)

Mr. Huffman: I object to the reading of that portion of the charge that your Honor read twice. I thought it unduly emphasized a part of the charge which was weighted towards the prosecution. I think proper balance would have required that you also read part of the charge with respect to reasonable doubt and what not.

• • • •

Appendix F—Stipulation Waiving Inclusion of Sentencing Minutes in Record on Appeal, Dated January 21, 1982

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

Indictment No. 0710/81

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSE OJEDA,

Defendant-Appellant.

It is hereby stipulated and agreed by and between the attorneys for both sides that:

1. The defendant was sentenced by the Honorable Jerome Hornblass on October 19, 1981 to a term of 5 years probation, with a period of incarceration of forty-five (45) days to be served on weekends.

2. Execution of the sentence was stayed pending the determination of this appeal.

3. The minutes of the sentencing are unnecessary to the prosecution of this appeal and their inclusion in the record

is hereby waived. No excessive sentence argument will be raised by Appellant.

Dated: New York, New York
January 21, 1982

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No. 82-1249

IN THE

Supreme Court of the United States

October Term, 1982

JOSE OJEDA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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No. 82-1249

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THE PEOPLE OF THE STATE OF NEW YORK,

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

On October 18, 1981, petitioner Jose Ojeda was convicted in the Supreme Court, New York County (McQuillan, J. at hearing; Hornblass, J. at trial), after a jury trial, of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4]). He was sentenced to five years probation, less forty-five days incarceration to be served on weekends. Execution of his sentence has been stayed pending the disposition of this petition.

By an order dated September 16, 1982, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment of conviction. *People* v. *Ojeda*, 89 A.D.2d 941 (1st Dep't 1982). Leave to appeal to the New York Court of Appeals was denied by a November 23, 1982, order of Judge Jacob Fuchsberg of that court. *People* v. *Ojeda*, 58 N.Y.2d 694 (1982). Petitioner now seeks a writ of certiorari in this case.

Statement of the Case

In the early morning hours of September 5, 1980, the car petitioner was driving was stopped by two New York City police officers, after petitioner had made an illegal left turn. A rental agreement revealed that petitioner was not an authorized driver of the vehicle. One of the officers saw petitioner lean forward in the car seat and drop his hands out of sight. Petitioner was ordered out of the car. A .357 Magnum pistol was recovered from under the seat, and petitioner was charged with its possession.

The Suppression Hearing

On April 13, 1981, a pre-trial hearing was held before New York Supreme Court Justice Peter McQuillan on petitioner's motion to suppress the gun recovered from the car. Officer James Dugan was the only witness at the hearing. He related the circumstances surrounding recovery of the gun.

While driving south on St. Nicholas Avenue in Manhattan during the early morning hours of September 5, 1980,

Police Officers Dugan and William Ohrnberger spotted a car with a Wisconsin license plate double parked in the northbound lane between 146th and 147th Streets. By the time the police made a U-turn, the Wisconsin car had begun to move toward 147th Street. At the corner, petitioner, the driver of the car, made a left turn without signalling and parked the car near a hydrant as the police pulled up behind him.

Officer Dugan approached petitioner, who had, unrequested, stepped out of his car. The officer asked him for his license and registration. Petitioner answered that he had neither. He said the car belonged to a friend, whom he named, and for whom he was parking it. After searching through some papers on the front seat, petitioner located a rental agreement in the glove compartment. Neither his name nor that of his friend was listed as an authorized driver. Although the Wisconsin car had not been listed as a stolen vehicle in the New York City stolen vehicle computer system, the officers decided to pursue their investigation of petitioner and the car at the stationhouse.

Officer Ohrnberger, who had possession of the car keys, got into the car, patted under the seat and recovered the gun. Back at the precinct, an inventory search of the car was conducted. Calls to the rental agency revealed that the car was missing from their lot.

In denying the defense motion, the court found that petitioner's failure to signal for his left turn was a proper predicate for the officers' request for petitioner's license and registration. When petitioner produced a rental agreement which named others as the authorized drivers, the

police had probable cause to believe the car was stolen and could then search the car for evidence of true ownership. The fortuitous seizure of the gun was proper.

In the alternative, the court found that the gun was admissible on a theory of inevitable discovery since an inventory search of the impounded vehicle would have revealed the gun's existence.

The Evidence at Trial

The People's evidence at trial consisted of the testimony of both Officers Dugan and Ohrnberger who related the facts of the case as they had been set forth at the hearing, with some additional details.

Officer Dugan added that, from prior experience with this national car rental agency, he knew that its rental agreements were printed by computer and were not handwritten as in this case. Officer Ohrnberger testified that when petitioner was looking for the car's registration, he was breathing heaviiy and his hands were shaking visibly. The officer also testified that as petitioner spoke to Officer Dugan from the car, Officer Ohrnberger saw petitioner lean forward and drop his hands out of sight between his legs. Drawing his gun, Officer Ohrnberger ordered petitioner out of the car. Some four or five inches under the front of the driver's seat, the officer retrieved a loaded .357 Magnum Ruger revolver.

Officer Dugan was also called by the defense, but his testimony paralleled his previous trial and hearing testimony. Petitioner then called two character witnesses in his behalf.

The State Appeal

Following his trial and conviction, petitioner appealed to the Appellate Division, First Department. He argued, *inter alia*, that the gun was illegally seized and that the jury was improperly charged on the presumption of knowing possession of a weapon in a vehicle. The court unanimously affirmed the judgment of conviction on September 16, 1982. Leave to appeal to the New York Court of Appeals was denied by Judge Fuchsberg on November 23, 1982.

The Instant Petition

On January 21, 1983, the instant petition was filed. Petitioner renews his claim that the presumption of knowing possession was unconstitutional as applied and that the gun was recovered following an unconstitutional search of the car.

Reasons for Denying the Writ

Generally, this Court will grant a petition for certiorari where novel issues of national import or constitutional dimension are raised, or where there exists a split among the federal appellate courts as to a particular issue. *See, e.g., Davis* v. *Alaska*, 415 U.S. 308, 315 (1974); *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947). *See generally* Stern & Gressman, *Supreme Court Practice*, Sec. 4.27, pp. 315-17 (5th ed. 1978).

As will be demonstrated, neither question petitioner raises justifies a grant of certiorari. At best, in his attack on the car search and the use of the presumption in this case, petitioner seeks correction of what he perceives to be

errors committed by the state courts in applying settled law to specific facts. However, this Court's discretionary power in granting certiorari is best served when exercised to review only those cases whose impact will extend beyond the particular facts and litigants. *See Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923); *see also* Stern & Gressman, *Supreme Court Practice*, Sec. 4.2, pp. 257-59 (5th ed. 1978). This is not such a case.

1. Petitioner's first claim, that New York's presumption of gun possession in a car is invalid as applied to him, is no more than an expression of petitioner's disagreement with the state court's application of the facts of this case to settled law.

The constitutionality of New York's statutory presumption that occupants of a car knowingly possess the guns found inside (New York Penal Law §265.15[3]) has already been upheld by this Court and is not itself at issue. *Ulster County* v. *Allen*, 442 U.S. 140 (1979). There is no reason to grant certiorari to consider whether the presumption was valid under a particular set of facts. There is certainly no reason to do so here, because petitioner clearly came within the constitutionally permissible presumption.

So long as there exists a rational connection between the presence of the gun in the car and petitioner's knowing possession of it, the presumption is appropriate. *Id.* at 165. That rational connection was clearly supported even under the individual facts of this case. Immediately after the stop, petitioner, unrequested, got out of the car. When he returned to it to search for the car's registration, he was breathing heavily and his hands were shaking visibly. Most

significantly, while Officer Dugan was preoccupied in examining the suspicious rental agreement, Officer Ohrnberger saw petitioner lean forward in his seat and drop his hands out of sight between his legs. The .357 Magnum revolver was recovered from under the front seat. Petitioner's guilty knowledge of the gun's presence was thus amply demonstrated.

In a separate argument, petitioner asserts that the combined effect of the rules of standing and the presumption was to create an "unfair legal predicament" by depriving him of any chance to defend himself. *See* Petition p. 8. He argues that he could not contest the legality of the search for lack of standing, and that the application of the presumption then mandated his conviction. This argument, based on a false premise, must fail. Petitioner was not deprived of the opportunity to dispute his guilt.

First, the presumption in the New York law is not, as petitioner supposes, a mandatory one but is permissive, and could have been rebutted. Moreover, the statute itself contains certain exceptions which, if shown, would render the presumption inapplicable. New York Penal Law §265.15 (3). *See also Ulster County* v. *Allen, supra,* 442 U.S. at 162; *People* v. *Lemmons,* 40 N.Y.2d 505 (1976).

Second, a defendant's rights are not violated merely because the rules of standing leave him powerless to contest the introduction of evidence which will inevitably lead to his conviction. Even if this were the effect of these rules in a particular case, that result would create no issue justifying review by this Court. It is clear that the availability of a constitutionally valid presumption remains unaffected

by a case in which a defendant may lack standing to raise a suppression issue. There is, thus, no reason to resurrect the recently interred concept of automatic standing for these cases. *See, e.g., United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1979).

Finally, in this particular case it is not altogether clear that petitioner was denied an opportunity to contest the seizure. The issue of standing was, as petitioner concedes, never addressed by the suppression court. Although it was raised before the Appellate Division, there is no reason to believe that that court did not simply affirm the hearing court's findings without reaching the issue of standing. New York Criminal Procedure Law §470.15. There is no reason to grant certiorari to consider an issue whose effect in this case is purely conjectural.

Thus, petitioner's first question presents no issue warranting the granting of the writ. The applicable law is settled, and, on the facts of this case, was correctly applied.

2. Petitioner's second ground for granting the writ, that the search of the car was unconstitutional, is similarly unavailing. In essence, his claim is that the police lacked probable cause to search the car and that the gun must therefore have been recovered pursuant to a "frisk" of the car, the propriety of which has not been approved by this Court and as to which there apparently exists a conflict within the circuits. Petition pp. 9-10.

Petitioner has again predicated his claim on the need to review an issue not presented in state court. The state court did not uphold the police seizure of the gun on a

theory of reasonable suspicion allowing a "frisk" of a car. Rather, the seizure was justified as pursuant to a lawful search based on probable cause. Consideration of petitioner's claim would require this Court to determine that, under the individual facts of this case, the state court erred in its determination of probable cause, and that had it not done so, it would have decided the case on the basis of the right to "frisk" a car.

There is obviously no basis for granting certiorari on an issue whose very presence in the case must be so tenuously inferred. Nor is there any reason to grant the writ to make the initial determination of whether the state court correctly applied established principles of probable cause in this case. That is particularly true here, where the finding of probable cause was amply supported by the record. Indeed, petitioner's inability reasonably to account for his presence in a car that neither he nor his "friend" were authorized to drive presented the police with a *prima facie* case of Unauthorized Use of a Vehicle, a Class A misdemeanor. New York Penal Law §165.05(1).

The seizure of the gun, then, occurred subsequent to the crystallization of the probable cause and was proper. *See United States* v. *Ross*, —— U.S. ——, 102 S. Ct. 2157 (1982); *New York* v. *Belton*, 453 U.S. 454 (1981). That it was only a stop for a "routine traffic infraction" which set this sequence of events in motion is irrelevant. Second, even if the facts justified only a stop and frisk, there is no disagreement within the circuits as to the propriety of a stop and frisk under these circumstances. Where the officer reasonably believes that there is a weapon present, he may look for it to insure his safety while he pursues his investi-

gation. *See, e.g., Adams* v. *Williams*, 407 U.S. 143 (1972). To the extent the federal appellate courts differ, it is on the propriety of general, unspecified searches of cars rather than on searches particularly directed at an area where the officers have reason to believe a weapon exists. The type of car "frisk" situation petitioner posits, then, is simply not present here. Coincidentally, however, that particlar issue is now before this Court. *See Michigan* v. *Long*, Dkt. No. 82-256.

Finally, even were petitioner correct in his legal arguments, the question is nevertheless inappropriate as a basis for a grant of a writ of certiorari. Petitioner has not only asserted as a basis for review an issue which was not crucial below, but has omitted an alternative ground for the decision which was present and on which the state court specifically relied. That ground for sustaining the seizure, a ground which petitioner does not even contest, is the principle of inevitable discovery. *See, e.g., United States* v. *Crews*, 445 U.S. 463, 470 (1980); *People* v. *Fitzpatrick*, 32 N.Y.2d 499, 506 (1973).

In light of the information contained in the rental agreement, the police had decided to bring the car and petitioner to the stationhouse to continue their investigation. They would certainly have been entitled to hold the car pending an investigation, regardless of whether they had arrested petitioner. At the precinct, the car would have been subjected to an inventory search and the gun recovered. *See, e.g., South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

Since it is not disputed that there is a ground for the search which would be unaffected by petitioner's present claims, there is no reason to review those claims.

Again, only settled law is at issue, and that settled law was correctly applied by the state courts.

Conclusion

The petition for a writ of certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

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